No. 92-515

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,
Petitioner,
v.
TODD MITCHELL,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF FOR LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I.

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("the Lawyers' Committee") submits this brief as *amicus curiae* in support of Petitioner, the State of Wisconsin.[1]

The Lawyers' Committee is a legal services organization which, since 1968, has provided free legal services to communities

[1] *Amicus* is aware of the Petition for Certiorari which has been filed by the State of Ohio and in filing this brief in support of the State of Wisconsin's petition is not stating a preference. *Amicus* was unable to sufficiently prepare to file a brief in the cases of *Ohio v. Wyant*, *Ohio v. May*, and *Ohio v. Van Gundy* (collectively United States Supreme Court No. 92-568) but would encourage this Court's review of all of these cases to permit resolution of many of the broader and important issues which have arisen since this Court's decision in *R.A.V. v. City of St. Paul*, ____ U.S. ____, 112 S. Ct. 2538 (1992).

traditionally underrepresented within our society. A primary mandate of the Lawyers' Committee is to represent individuals and communities in the San Francisco Bay Area who have experienced discrimination because of their race, ethnicity, national origin, color or immigration status. For twenty-five years, the Lawyers' Committee has worked closely with communities of color and immigrant and refugee communities to ensure that their civil rights are protected and enforced.

In 1991, the Lawyers' Committee initiated its Racial Violence Project. The Racial Violence Project is designed to address both the effects and root causes of racially motivated violence throughout the San Francisco Bay Area. The Project's primary efforts include providing public education about and encouraging utilization of California's hate violence and hate crime laws.

The case of *Wisconsin v. Mitchell*, 485 N.W.2d 807 (1992), raises issues of great importance to the clients served by this *amicus curiae*. California's hate crimes laws are a vital link in the chain of legislative and law enforcement efforts to safeguard the civil rights of individuals from traditionally underrepresented communities. The California Legislature drafted these laws to combat the increasing incidence of discriminatory and bias-motivated violence. The Legislature did so taking great care not to infringe upon guaranteed First Amendment rights. The statute involved in the present case is substantially similar to several of the California statutes. Therefore, if the Wisconsin statute is found to be unconstitutional, the validity of the California statutes may also be implicated.[2]

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[2]Presently, there are at least three cases focusing on the constitutionality of several of California's hate crime statutes pending in the California appellate courts.

II.

SUMMARY OF ARGUMENT

> Experience teaches that racial violence has a broadly inhibiting effect upon the exercise by members of the Negro [sic] community of their Federal rights to nondiscriminatory treatment. Such violence must, therefore, be broadly prohibited if the enjoyment of those rights is to be secured.[3]

Though clearly not a new phenomenon, the occurrence of "hate violence" and "hate crimes" is on the rise in California and throughout the country.[4] A variety of theories have been advanced about the causes of this recent increase in bias-motivated activity, from economic hard times to a lack of political leadership on issues of diversity. Whatever the cause, however, such incidents are indeed becoming more frequent.[5] In San Francisco alone, according to statistics compiled by the San Francisco Police Department's Hate Crimes Unit, there were a total of 401 incidents of hate violence and crime reported to the police during 1991.[6] Since most victims do not report incidents to the police for a variety of cultural and political reasons, the actual figure, in all likelihood, is significantly higher.

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[3]S. Rep. No. 721, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.N.A. 1837, 1842 (1969).

[4]The terms "hate violence" and "hate crime" are generally understood to encompass harassing, intimidating, violent behavior and conduct, motivated by bias or discrimination. *See California Attorney General's Commission on Racial, Ethnic, Religious and Minority Violence*, Final Report (April 1990); H. Ehrlich, *Campus Ethnoviolence and the Policy Options*, National Institute Against Prejudice & Violence, Report No. 4 (March 1990).

[5]*See 1991 Audit of Anti-Semitic Acts*, Anti-Defamation League (1992); *California Attorney General's Report, supra*; P. Ephross, A. Barnes, H. Ehrlich, K. Sandnes and J. Weiss, *The Ethnoviolence Project — Pilot Study*, National Institute Against Prejudice & Violence, Report No. 1 (Oct. 1986); J. McDevitt, *The Study of the Character of Civil Rights Crimes in Massachusetts 1983-1987* (1989).

[6]Memorandum re Yearly Recap of Hate Crimes Statistics 1991, from Officer S. Bargini of the Hate Crimes Unit of the San Francisco Police Department to Captain J. Willet, Commanding Officer, Special Investigations Division of the San Francisco Police Department (Jan. 16, 1992).

Responding to these threats to its citizens, the California Legislature passed civil and criminal statutes which provide remedies to victims as well as recourse for the State against perpetrators of hate violence and hate crime. Penal Code section 422.7, the sentence-enhancement provision similar to the statute at issue in *Mitchell,* is an integral part of this scheme of civil rights laws.[7] The constitutionality of the Wisconsin statute is

[7]California Penal Code section 422.6 provides:

> (a) No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the constitution or laws of this state or by the Constitution or laws of the United States because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation.
>
> • • • •
>
> (c) Any person convicted of violating subdivision (a) . . . shall be punished by imprisonment in a county jail not to exceed one year, or by a fine not to exceed five thousand dollars ($5,000), or by both that imprisonment and fine. However, no person shall be convicted of violating subdivision (a) based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat.

Section 422.7 provides a felony enhancement where:

> [T]he crime is committed against the person or property of another for the purpose of intimidating or interfering with that other person's free exercise or enjoyment of any right secured to him or her by the constitution or laws of this state or by the Constitution or laws of the United States and because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation. . . .

Similarly, the statute at issue in *Mitchell* provides:

> 939.645. Penalty; crimes committed against certain people or property:
>
> (1) If a person does all of the following, the penalties for the underlying crime are increased as provided . . .
>
> (a) Commits a crime . . .
>
> (b) Intentionally selects the person against whom the crime . . . is committed or selects the property which is damaged or otherwise affected . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.
>
> (2)(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.
>
> (b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.
>
> (c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.
>
> (3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).
>
> (4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

Wisconsin Stat. Ann. § 939.645 (West 1991).

thus an important issue not only to Wisconsin but also to all other states, such as California, that have enacted similar laws.

Based on this Court's recent decision in *R.A.V.*, the *Mitchell* court held that the Wisconsin sentence-enhancement provision constitutes an impermissible, content-based prohibition on the First Amendment right to free speech. Its reasoning is faulty at best. In *R.A.V.*, this Court found facially invalid a local ordinance that specifically prohibited the expression of certain viewpoints. Sentence-enhancement provisions for bias-motivated crimes, in contrast, criminalize activity on a content-neutral basis and punish only conduct. The First Amendment is not implicated by this type of criminal statute because it does not regulate, nor interfere with, the right to free expression. Rather, the statute's aim, as well as its effect, is to prohibit *discriminatory conduct*, a compelling legislative goal.

Several decisions from courts in other states reach the contrary, and, *amicus* believes correct, conclusion by refusing to apply *any* First Amendment scrutiny to similar statutes. To the extent that *Mitchell* conflicts with these decisions of other state courts, as well as established federal precedent, this Court should review the decision and establish a uniform rule.

Finally, even assuming that the enforcement of the sentence-enhancement does implicate expressive rights, the provision at

issue in *Mitchell* is a content-neutral law which only secondarily affects conduct's expressive elements. As such, the Wisconsin statute passes constitutional muster under the well-established test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968).

III.

ARGUMENT

A. THE VALIDITY OF HATE CRIME SENTENCE-ENHANCEMENT STATUTES PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW THAT THIS COURT SHOULD DECIDE.

California, with other states, has a strong interest in preventing hate violence.[8] Bias-motivated crimes have a particularly pernicious effect on both the victim and the community at large.

The hatred, bias and bigotry that motivate perpetrators to commit bias-motivated crimes distinguish such crimes from other assaults, threats of violence or acts of vandalism. Studies indicate that hate crimes more often involve physical assault than conventional crimes. For example, the Department of Justice has found that approximately 10% of reported conventional crimes are personal assaults, while the remaining 90% are directed at property. *Report to the Nation on Crime and Justice*, U.S. Department of Justice, at 12 (2d ed. 1988). Statistics reported from several police departments, however, indicate that more than 30% of bias-motivated crimes are personal assaults. B. Levin, *A Practical Approach to Bias Crimes for Police* (1992); *see also Hate Crime In Massachusetts — Preliminary Annual Report — January-December 1990*, Executive Office of Public Safety Criminal History Systems Board, Crime Reporting Unit, at 3 (Jan. 24, 1991). Similarly, the National Institute Against Prejudice and Violence reported that physical assault was the most common form of bias-motivated crime, accounting for 24.8% of bias-motivated crimes reported in its sample. *The Ethnoviolence Project-Pilot Study, supra*, at 5.

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[8]With regard to the State's interest in "[ensuring] the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish," the Court in *R.A.V.* concluded: "We do not doubt that these interests are compelling...." *R.A.V.*, 112 S. Ct. at 2549.

In California, recent studies indicate that hate crimes occur every day and are at "an all-time high." *Freedom From Fear — Ending California's Hate Violence Epidemic*, Final Report of the Lieutenant Governor's Commission on the Prevention of Hate Violence, at 1 (May 1992). The Lieutenant Governor's Report provides an alarming amalgam of hate crimes statistics from 1991, including:

- The Anti-Defamation League of B'nai B'rith ("ADL") reported a 34 percent rise in attacks and threats against Jews in California.
- The Los Angeles County Gay and Lesbian Community Services Center reported a 50 percent increase in the number of attacks on gay and lesbian people reported to them.
- The National Gay and Lesbian Task Force saw a 31 percent increase in gay-bashing attacks in five major U.S. cities, with 473 — an 11 percent increase — reported in San Francisco by Community United Against Violence.
- In the best comprehensive data available on hate violence in California, the Los Angeles County Human Relations Commission reported 672 incidents of hate violence in the Los Angeles County region, a 22 percent increase over 1990. These included 147 incidents directed at gay men and 20 at lesbians, 130 at African Americans, 130 at Jewish people, 67 at Latinos, 54 at Asian Americans, and 22 at Arab Americans.
- A marked increase in physical assaults over other manifestations of hate violence. For the first time, physical assaults outnumbered all other incidents of hate violence reported to the Commission, making up almost 37 percent of the total.
- With regard to other common targets, African Americans, Jewish Americans and immigrants of all backgrounds have long been targets of hate violence, and continue to be the favored targets. Latinos have also been a major target, particularly here in California with its large and growing Latino population. Asian Americans have suffered increased levels of violence directed at them as economic competition with countries like Japan, Korea and Taiwan has generated societal tensions. Arab Americans were victimized by numerous attacks, threats and vandalism before, during, and after the Persian Gulf War of 1991.

Id. at 1-2. Based on these facts, the Lieutenant Governor concluded: "We characterize these trends, we think not overdramatically, as an epidemic of hate violence." *Id.* at 2.

Certainly the states have an important interest in ending what, at least in California, has been characterized as an "epidemic" of hate violence. Numerous courts, both federal and state, have so held. *See United States v. Gilbert,* 813 F.2d 1523 (9th Cir.), *cert. denied,* 484 U.S. 860 (1987); *United States v. Bledsoe,* 728 F.2d 1094 (8th Cir.), *cert. denied,* 469 U.S. 838 (1984); *New York v. Grupe,* 532 N.Y.S.2d 815, 818 (N.Y. Crim. Ct. 1988); *Oregon v. Beebe,* 680 P.2d 11, 13 (Or. Ct. App. 1984). This Court's review of the constitutionality of such laws would provide clear guidance to state legislatures as they struggle to remedy these reprehensible crimes.

B. THE WISCONSIN SUPREME COURT IN *MITCHELL* MISAPPLIED WELL-SETTLED FIRST AMENDMENT LAW TO REACH AN ERRONEOUS RESULT.

First Amendment interests simply are not implicated by legislation that allows for the enhancement of sentences for persons who perpetrate crimes against certain classes of citizens. Crimes such as assault or murder are not activities that are vested with any First Amendment protection. Sentence-enhancement statutes like Wisconsin's provide increased penalties when such conduct, that is already criminalized, is inflicted in a discriminatory manner. Just as the underlying crime itself involves no First Amendment interests, neither does that crime's discriminatory motive or method of execution.

This Court has long held that the First Amendment protects expression and not conduct. *See Spence v. Washington,* 418 U.S. 405, 409 (1974). By its very terms, the First Amendment shelters simply speech: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend I. Admittedly, courts have extended First Amendment protection to conduct imbued with a high degree of expression. Thus, this Court has struck down government regulations prohibiting conduct which is so saturated by expressive qualities that regulation of the act is tantamount to impermissibly inhibiting the actor's ability to communicate. *See Texas v. Johnson,* 491 U.S. 397 (1989) (flag burning); *Tinker v. Des Moines Indep. Community School Dist.,* 393 U.S. 503 (1969) (black armbands); *O'Brien,* 391 U.S. 367 (draft card burning). This Court's decision in *R.A.V.* is the latest chapter in this chronicle of expressive conduct cases, holding that

cross burning in certain situations was conduct sufficiently imbued with expressive qualities to merit First Amendment protection.

Yet, this Court in *R.A.V.* also emphasized the distinction between regulations aimed at conduct that is only marginally or incidentally "expressive" and regulations that single out the expressive elements of certain conduct for punishment.[9] Because the St. Paul statute prohibited *expressive* conduct based on its *content*, the Court found it offended First Amendment principles.[10] In so holding, this Court did *not* extend First Amendment protections to all conduct that is arguably "expressive." In fact, the Court expressly guarded its holding from such an interpretation:

> [S]exually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination . . . *where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulations merely because they express a discriminatory idea or philosophy.*

Id. at 2546-47 (emphasis added). This Court did not find that the statute in *R.A.V.* violated the First Amendment because it prohibited discrimination; indeed, the Court recognized that acts of discrimination are not protected expression. Rather, the Court found that the statute's *selection* of certain types of discriminatory *expression* violated the First Amendment.[11]

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[9]The St. Paul statute provided:

> "Whoever places on public or private property a symbol, object, appellation, characterization or grafliti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender, commits disorderly conduct and shall be guilty of a misdemeanor."

R.A.V., 112 S. Ct. at 2541 (*quoting* Minn. Legis. Code § 292.02 (1990)).

[10]Thus, the Court stated:

> The government may not regulate [conduct] based on hostility — or favoritism — towards the underlying message expressed.

Id. at 2545.

[11]It is important to note that the defendant in *R.A.V.* was convicted pursuant to several statutes, but challenged only the "fighting words" conviction. The defendant in *R.A.V.* did not challenge his conviction

This language in the *R.A.V.* opinion highlights two key differences between the statute at issue in *R.A.V.* and that in *Mitchell*. First, the Wisconsin statute deters criminal conduct when it is inflicted in a discriminatory or bias-motivated fashion. It does not prohibit speech, or expressive conduct as such, in any way. Second, the statute is content neutral. It does not selectively regulate conduct which expresses certain disfavored topics as did the St. Paul ordinance. Thus, "there is no reasonable possibility that official suppression of ideas is afoot." *R.A.V.*, 112 S. Ct. at 2540.

For these reasons, *R.A.V.* is simply inapplicable to *Mitchell*. Indeed, the *R.A.V.* Court expressly qualified its holding by stating that individuals who discriminate cannot justify their activity with the First Amendment merely because their actions might include a discriminatory idea or philosophy. *Id.* at 2546-47. Citing to federal statutes that prohibit discrimination, this Court clearly rejected any attempt to bootstrap an illegal activity such as discrimination into the First Amendment's sphere of protected activity. *Id.* at 2546.

C. THIS COURT SHOULD REVIEW *MITCHELL* BECAUSE IT CONFLICTS WITH OTHER STATE COURT DECISIONS.

Recently, the Oregon Supreme Court held that criminal enhancement statutes for hate crimes were constitutional. *Oregon v. Plowman*, ____ P.2d ____, 314 Or. 157, 1992 WL 207677 (Or. Aug. 27, 1992). *Plowman* involved a statute that criminalized " 'intentionally, knowingly or recklessly [causing] physical injury to another because of [the] perception of that person's race, color, religion, national origin or sexual orientation.' " *Id.* at *1 (quoting Oregon Revised Statute ("O.R.S.") 166.165(1)(a)(A)).[12] The defendant in *Plowman* argued, *inter alia*, that his conviction under the statute " 'must necessarily be proved by the

under the Minnesota statute punishing racially motivated assaults, Minnesota Statute § 609.2231(4). *R.A.V.*, 112 S. Ct. at 2541 n.2.

[12]While O.R.S. 166.165(1)(a)(A) "creates and defines the crime of intimidation in the first degree," *id.* at *1, the defendant challenged it as a statutory enhancement. *Id.* at *3. The reasoning behind the challenge apparently rested on the fact that intimidation in the first degree is a Class C felony, while assault in the fourth degree — the basis of defendant's other conviction — is a Class A misdemeanor. *Id.* Thus,

content of his speech,' " *id.* at *3, and therefore violated the First Amendment.

The Oregon Supreme Court rejected this argument, holding that the statute regulates *only* conduct and thus is consistent with the First Amendment. The court refused to apply *R.A.V.*, holding:

> The [*R.A.V.*] Court distinguished laws, such as the St. Paul ordinance, that are directed against the substance of speech from laws that are directed against conduct . . . .
>
> [The Oregon Statute] is a law directed against conduct, not a law directed against the substance of speech. In *R.A.V.*, the Court expressly did not rule on the constitutionality under the First Amendment of a statute like the one that we consider here.

Id. at *6.

The *Plowman* court found the regulation did not necessarily impinge upon speech; a multitude of evidentiary showings not involving speech could establish the intent to discriminate. *Id.* Further, the *Plowman* court found that any burden on speech created by the fact that speech *might* be used to prove a violation of O.R.S. 166.165 was *de minimis* and no greater than the burden on speech presented by other crimes, such as attempted murder, where a defendant's intent might be proven by evidence of his spoken or written statements. *Id.*[13]

Because *Mitchell* conflicts with the well-reasoned opinion of the Oregon Supreme Court in *Plowman*, this Court should grant certiorari and resolve the conflict.

D. THE APPLICABLE FIRST AMENDMENT STANDARD, IF ONE IS TO BE APPLIED, IS THE *O'BRIEN* TEST, AND THE WISCONSIN STATUTE IS VALID UNDER THIS TEST.

Even assuming that some level of First Amendment scrutiny applies to criminal conduct aimed at particular classes of people, the statute at issue here survives such scrutiny. As a regulation

application of O.R.S. 166.165(1)(a)(A) acted as a *de facto* enhancement of the punishment the defendant would otherwise have received.

[13]Similarly, an appellate court in Florida has refused to apply First Amendment scrutiny to that state's hate crime statute. *See Dobbins v. Florida*, No. 91-1953, 1992 WL 235338 (Fla. Dist. Ct. App. Sept. 24, 1992)

aimed at conduct that only marginally affects expressive activity, a criminal enhancement for hate crimes is valid if it meets the test set forth in *O'Brien,* 391 U.S. 367. The *O'Brien* test validates such a regulation if: (1) it is within the constitutional power of the state; (2) it furthers an important government interest; (3) that interest is unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that governmental interest. *Id.* at 377.

First, the power of the State of Wisconsin to criminalize violent behavior is clear. The legislature has the power to pass laws that are reasonably necessary to promote the public health, safety and morals. *See Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). "There is no question that the proscription of force or [the] threat of force is within the government's powers." *Gilbert*, 813 F.2d at 1531.

In addition, hate crime legislation, such as the Wisconsin statute, furthers an important state interest. As noted in Section III.A., *supra*, hate crimes pose a serious threat to the health and stability of our society. State legislatures such as Wisconsin's have reacted by enacting laws aimed at curbing discriminatory violence. These laws work to prevent the escalating level of hate violence that often accompanies a single incident of bias-motivated violence.

The third prong of the *O'Brien* test is also satisfied by the Wisconsin statute. The purpose of the statute is to address the phenomenon of hate crimes. It does not prohibit racial animus or its expression, but only the manifestation of that hatred in an act such as an assault or battery.

Finally, the incidental restriction on expression, if any, caused by the Wisconsin statute is no greater than is essential to eliminate discriminatory conduct. The purpose of the Wisconsin statute is to prevent discrimination, and it does so in the most direct manner possible by prohibiting the act of discrimination itself. No other means could more directly serve this end.

Thus, under the four-prong *O'Brien* test, the Wisconsin statute does not violate the First Amendment.

IV.

CONCLUSION

For the foregoing reasons, the Court should grant the writ of certiorari to the Wisconsin Supreme Court and give careful consideration to the issues raised by this case.

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Respectfully submitted,

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